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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO JESUS MENDOZA,

Defendant and Appellant.

F077578

(Super. Ct. No. VCF294661A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Smith, J. and Snauffer, J.

INTRODUCTION

In 2015, a jury convicted appellant Gustavo Jesus Mendoza of attempted robbery (Pen. Code, §§ 664/211;¹ count 1); conspiracy to commit robbery (§§ 182/211; count 2); prohibited possession of a firearm (§ 29800, subd. (a)(1); count 3); and masked criminal possession of a firearm in public (§ 25300, subd. (a); count 4).² The jury found true firearm and criminal street gang enhancements. Appellant received an aggregate prison sentence of 31 years.³ This sentence included a 10-year term for a firearm enhancement under section 12022.53, subdivision (b), and a five-year term for a prior serious felony conviction under section 667, subdivision (a)(1).

Appellant appealed, raising various issues. In January 2018, this court issued an unpublished opinion in *People v. Mendoza* (Jan. 10, 2018, F071822). We affirmed appellant's judgment but vacated his sentence. In light of newly enacted Senate Bill No. 620 (2017-2018 Reg. Sess.), we remanded the matter to the trial court for resentencing. The court was directed to determine whether it should strike the firearm enhancement pursuant to section 12022.53, subdivision (h). (*People v. Mendoza, supra*, F071822.)

In May 2018, appellant appeared in the trial court with his defense counsel. After hearing argument, the court denied appellant's request to strike the firearm enhancement. Appellant brought the present appeal, raising two issues.

We reject appellant's first claim that the trial court abused its discretion in declining to strike the firearm enhancement. However, we agree with the parties that appellant's matter must be again remanded. While appellant's appeal was pending,

¹ All future statutory references are to the Penal Code unless otherwise noted.

² Appellant was tried with two codefendants, Miguel Angel Villegas and Joel Serrato. The codefendants are not parties to the present appeal.

³ This sentence also included time imposed in a companion case, Tulare County Superior Court case number VCF237778A, which is not part of this appeal.

Senate Bill No. 1393 (2017-2018 Reg. Sess.) amended sections 667 and 1385 to provide trial courts with discretion to strike five-year sentencing enhancements based on prior serious felony convictions under section 667, subdivision (a)(1). (*People v. Kelly* (2019) 32 Cal.App.5th 1013, 1015–1016.) We will remand this matter so that the court may exercise its discretion regarding this five-year term. We otherwise affirm appellant’s judgment.

BACKGROUND

I. The Relevant Trial Facts Regarding The Firearm Enhancement.

As set forth in our prior opinion, appellant and his codefendants attempted to rob an undercover agent from the Drug Enforcement Administration.⁴ The agent was waiting in a park to make a prearranged purchase from a drug seller.⁵ (*People v. Mendoza, supra*, F071822.) While the agent waited, appellant and another codefendant, Villegas, walked together in tandem towards the agent. Appellant had his face covered up to the bridge of his nose with some type of white cloth. He wore a long-sleeved sweatshirt, or something similar, and he walked with his right hand tucked underneath his opposite armpit. It appeared that appellant was carrying a weapon. (*People v. Mendoza, supra*, F071822.)

Appellant and Villegas came within about 10 to 15 yards of the agent. The agent did not see a gun, but he became nervous and he feared for his safety. The agent believed that appellant and Villegas were armed, and they were approaching to rob him. The agent drove away. Neither appellant nor Villegas said anything to the agent, and neither

⁴ In his opening brief, appellant states that he filed a motion requesting that we take judicial notice of the statement of facts contained in appellant’s opening brief and the facts in our prior opinion in *People v. Mendoza, supra*, F071822. However, such a motion does not appear in the present appellate record. In any event, on our motion we take judicial notice of the record in that prior matter. (Evid. Code, § 452, subd. (d).)

⁵ The drug seller, Ronald Ditlevson, Jr., was charged with crimes under federal law for his actions. At the time of appellant’s trial, Ditlevson had entered a plea agreement and was serving time in federal prison. (*People v. Mendoza, supra*, F071822.)

pointed a weapon at him. They did not run at the agent or try to stop him when he drove away. (*People v. Mendoza, supra*, F071822.)

After the agent drove away, an officer providing surveillance saw a shiny metal object in appellant's hand underneath his left arm near appellant's armpit. The officer saw about an inch of a gun's barrel. The officer determined that appellant was armed with a firearm. A short time later, officers made a traffic stop and detained appellant and the others involved in this matter. A loaded .45-caliber handgun was recovered from their vehicle. It had been lying under a towel or T-shirt. At trial, an officer testified that the barrel of the recovered handgun "had a 'consistent shape' " with the barrel of the handgun seen on appellant when the agent fled. (*People v. Mendoza, supra*, F071822.)

II. The Trial Court's Comments During The Hearing Regarding The Firearm Enhancement.

On May 7, 2018, appellant appeared before the trial court with his defense counsel regarding the imposition of the firearm enhancement. The court stated that, prior to this hearing, it had reviewed its notes, the probation report, its comments at the time of sentencing, and this court's unpublished opinion. The court stated it was prepared to rule but it invited additional arguments.

Appellant's counsel asked the court to consider that the witnesses only saw appellant with a gun "for a fraction of a second" and no evidence showed that the recovered gun facilitated the attempted robbery. According to defense counsel, the testifying officer had only observed "a glint of metal" and the officer had not been sure what he had seen. Defense counsel asserted that appellant's gun played a very small role in the events that transpired. Defense counsel asked the court to stay the firearm allegation.

The trial court noted that it had imposed the aggravated term based on appellant's "lengthy record."⁶ The court referred to the probation report, which included "a prior violent felony as an adult" for which appellant was on probation at the time of the current offense. The court stated that appellant had "five felonies involving violent acts as a juvenile." The court concluded that appellant "acted with little regard for law and demonstrates ongoing brazen criminal behavior stemming from his lifelong gang involvement. He has expressed no remorse." The court said it had considered this matter, it understood that it had discretion to strike the firearm enhancement, but it denied that request.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion Regarding The Firearm Enhancement.

Appellant argues that the trial court should have considered that his gun use in this matter was minimal. He also claims that the court mischaracterized his prior criminal history, and he asserts that his prior offenses were not "violent" as that term is used in section 667.5.⁷ He asserts that his prior offenses were neither numerous nor of increasing seriousness. He contends that the trial court abused its discretion in declining to strike or dismiss his firearm enhancement.⁸ Appellant's arguments are without merit.

When discretionary power is statutorily vested in the trial court, we will not disturb the trial court's decision on appeal unless "the court exercised its discretion in an

⁶ For the conviction of attempted robbery in count 1, appellant was sentenced to the upper prison term of six years. (§§ 664, subd. (d), 213, subd. (a)(1)(B).)

⁷ A defendant's prison term may be enhanced for new offenses because of prior prison terms based on certain enumerated "violent" felonies. (§ 667.5, subds. (a), (c).)

⁸ In his reply brief, appellant asserts for the first time that the trial court also erred in imposing the aggravated term against him in count 1, attempted robbery. We will not address that argument because it was raised for the first time in the reply brief. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218–1219.)

arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse of discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].) When exercising discretion to strike or dismiss a firearm enhancement, a trial court should consider several factors, “including the rights of the defendant, the interests of society represented by the People, and individualized considerations pertaining to the defendant and his or her offenses and background.” (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359.)

In this matter, the trial court considered and rejected the argument that the firearm enhancement should be struck or stayed because appellant’s gun use was minimal. Indeed, that was the only argument that defense counsel raised below. Because appellant personally used a firearm, it was well within the court’s discretion to decline to strike or stay imposition of this enhancement. (§ 12022.53, subd. (b) [any person who personally uses a firearm during an attempted robbery shall be punished by an additional and consecutive 10-year prison term].)

We reject appellant’s claim that the trial court mischaracterized his prior criminal offenses in a way that establishes an abuse of discretion. As noted by the court, appellant was on felony probation stemming from a December 2010 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)), along with a gang enhancement (§ 186.22, subd. (b)(1)(B)), when he committed the present crimes.⁹ Further, appellant had three relevant juvenile dispositions. In January 2007, the juvenile court sustained an allegation of felony assault with a deadly weapon. A gang “penalty” was found true. In February 2008, the juvenile court sustained an allegation of misdemeanor battery on a school, park

⁹ Appellant had multiple violations of probation, which ultimately extended his term of probation to July 2015.

or hospital property. In April 2010, the juvenile court sustained an allegation of felony battery with great bodily injury.¹⁰ Based on appellant's most recent adult conviction and these juvenile dispositions, the court was justified in declining to strike or stay the firearm enhancement in the present matter. (See *People v. Rocha*, *supra*, 32 Cal.App.5th at p. 359 [in exercising discretion, court may look at several factors, including the defendant's background].)

Although appellant's criminal history supports imposition of the firearm enhancement, we agree that the trial court may have mischaracterized some of appellant's juvenile matters. Appellant did not have five juvenile dispositions involving felonies. Instead, he had the two felony dispositions which are summarized above. Other juvenile felony allegations appearing in appellant's record did not result in dispositions. In June 2008, appellant was "Released/handled informally" following an allegation of felony exhibiting a deadly weapon, along with a gang enhancement. In November 2008, appellant was "Released/handled informally" following an allegation of assault with a deadly weapon with "likely" great bodily injury and a gang enhancement. On that same date, a felony shooting at an inhabited dwelling (along with a gang enhancement) was also alleged. In August 2009, appellant was "Released/Handled Inform[ally]" following an allegation of felony shooting at an inhabited dwelling. Although the court may have suggested that appellant had more felony juvenile dispositions than are reflected in this record, we reject appellant's claim that the court's mischaracterization demonstrates an abuse of discretion. To the contrary, appellant's overall criminal record amply supports the court's decision to not strike or stay the firearm enhancement.

¹⁰ In addition to these juvenile and adult offenses, appellant's criminal history included numerous other juvenile and adult matters. These included violations of probation, misdemeanor failure to register as a gang member, driving without a license, and misdemeanor resisting an officer.

Further, contrary to appellant's suggestion, it is clear that the trial court did not rely on section 667.5 when it classified appellant's criminal history as violent. Instead, the court was speaking generally, and we agree with the court's assessment. Appellant's prior record shows a clear pattern of violence. We agree with the court that appellant's prior offenses were numerous and of increasing seriousness. Appellant has shown a flagrant disregard for law, and he has demonstrated ongoing criminal behavior and gang involvement.

Finally, appellant relies on *People v. Granado* (1996) 49 Cal.App.4th 317 (*Granado*). This opinion does not assist him.

In *Granado*, the defendant and his accomplice followed two victims. Just before the defendant pulled a gun from his waistband, the second victim fled. The defendant's accomplice chased the second victim. The defendant demanded money from the first victim while holding his firearm. A jury convicted the defendant of two counts of attempted robbery and found true firearm enhancements in both counts. (*Granado, supra*, 49 Cal.App.4th at pp. 320, 321–322.) The *Granado* court upheld the jury's findings. *Granado* determined that, if a defendant deliberately shows a gun or otherwise makes its presence known in order to intimidate a victim to complete an underlying offense, then a jury may find personal use of a firearm. (*Id.* at p. 325.) It was immaterial that the second victim had not been aware of the gun's presence. (*Id.* at p. 326.) The *Granado* court stated that a defendant was required to “*keep the gun in his waistband*” in order to avoid a firearm enhancement. (*Id.* at p. 327.)

Appellant focuses on this last sentence from *Granado*. He argues that, based on *Granado*'s reasoning, a firearm enhancement should not apply in his situation. We disagree. First, we have already rejected appellant's contention that substantial evidence did not support the jury's true finding regarding this firearm enhancement. (*People v. Mendoza, supra*, F071822.) We will not readdress that issue. Second, *Granado* did not analyze under what circumstances a trial court might abuse its discretion in failing to

strike or stay a firearm enhancement. Cases are not authority for propositions not considered or decided. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.) *Granado* does not establish an abuse of discretion in this matter.

Based on this record, the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner. (See *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124–1125.) The court’s ruling did not fall outside the bounds of reason under the applicable law and relevant facts. (See *People v. Williams, supra*, 17 Cal.4th at p. 162.) As such, the trial court did not abuse its discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 375 [discretion is the power to decide one way or the other].) Accordingly, appellant’s arguments are without merit, and this claim fails.

II. This Matter Must Be Remanded So The Trial Court May Exercise Its Sentencing Discretion Under Senate Bill No. 1393.

The parties agree, as do we, that this matter must be remanded for the trial court to consider its sentencing discretion in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.). This legislation amended sections 667 and 1385 to provide trial courts with discretion to strike five-year sentencing enhancements based on prior serious felony convictions under section 667, subdivision (a)(1). (*People v. Kelly, supra*, 32 Cal.App.5th at pp. 1015–1016.)

Senate Bill No. 1393 (2017-2018 Reg. Sess.) retroactively applies because appellant’s case is not yet final. (*People v. Kelly, supra*, 32 Cal.App.5th at p. 1016.) Accordingly, we will direct the trial court to exercise its discretion as to the felony enhancement under section 667, subdivision (a)(1). We express no opinion on how the court should resolve this issue.

DISPOSITION

This matter is remanded to the trial court for the limited purpose of permitting the court to exercise its discretion whether to strike or dismiss the prior felony enhancement under section 667 as authorized by Senate Bill No. 1393 (2017-2018 Reg. Sess.). If the

court strikes or dismisses the prior felony enhancement, then the court shall resentence appellant accordingly. If appellant is resentenced, then the court shall forward an amended abstract of judgment to the appropriate authorities. If the court does not strike or stay the prior felony enhancement, then appellant's prior sentence shall remain in effect. In all other respects, appellant's judgment is affirmed.